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STATE FOR P, SCA/FO (DAS GASTRIGHT), SCA/A (JRELK), S/WCI  
(MSTAMILLO), L/PM (EPELOFSKY)  
NSC FOR AHARRIMAN  
OSD FOR ARICCI  
CENTCOM FOR CFC-A, CG CJTF-76, POLAD, CSTC-A

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SUBJECT: DETAINEE LEGAL FRAMEWORK: READOUT FROM FEBRUARY  
12 AFGHAN EXPERTS WORKING GROUP

REF: KABUL 369

Classified By: Political-Military Affairs Counselor Carol A. Rodley; re  
asons 1.4(b) and (d).

11. (S) Summary: Afghan legal experts are still preparing the GoA's response to our request for a written description of the legal framework that the GoA would apply to detainees transferred from the Bagram Theater Internment Facility (BTIF) and Guantanamo (GTMO) to GoA custody at the Afghan National Detention Facility (ANDF) (reftel). However, based on interim feedback U.S. representatives received at a February 12 meeting, it is clear that GoA legal experts have not identified an Afghan legal basis for the GoA to maintain the detention of "security detainees" (i.e., individuals not clearly prosecutable under Afghan criminal or national security laws). Afghan legal experts express general agreement that the detainees in five of the six "test cases" (reftel) would be prosecutable under Afghan law. They emphasize the importance to successful prosecutions of having adequate evidence. The Afghan National Security Council staff are aiming to have the GoA's written response on the Afghan detainee legal framework ready by February 19/20. See para 13 for Ambassador's recommendation on the USG approach to the expected GoA response.  
End Summary.

12. (S) On February 12, Afghan legal experts from the MOD, NDS, and MOJ met to discuss in detail issues related to the detainee legal framework the GoA has undertaken to describe in writing to the USG, in order to facilitate the transfer of detainees from BTIF and GTMO to the GoA (reftel). The meeting was organized by staff of the Afghan National Security Council, and Embassy and CSTC-A representatives were invited to attend to provide feedback. A list of participants is provided in paragraph 13.

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SECURITY DETAINEES: NO EVIDENT AFGHAN LEGAL BASIS  
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13. (S) Asked how the GoA would handle "security detainees" (i.e., individuals not clearly prosecutable under Afghan

criminal or national security laws) transferred from BTIF or GTMO to GoA custody at the ANDF, the consensus expressed at first among the Afghan legal experts was that the GoA would have to release such detainees. Polmiloff asked this question several different ways, emphasizing that one of the central objectives of the draft Presidential Decree -- which the GoA has rejected as unconstitutional and politically not viable -- was to ensure that the GoA would be able to continue to detain individuals considered dangerous, but who might not clearly be successfully prosecuted under Afghan criminal or national security law. After over an hour of discussion, none of the Afghan experts had any suggestions for how to address the problem of security detainees.

14. (S) When polmiloff pressed the Afghan legal experts to explain how the GoA would deal with detainees assessed to be very dangerous, but possibly not prosecutable under Afghan law, several of the experts replied that the USG should retain custody of such detainees, particularly those at GTMO, since bringing them to the ANDF, they fear, would present major security risks for the ANDF, as well as for the prosecutors, judges, and other GoA officials who would be involved in handling their cases.

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PROSECUTION ISSUES  
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15. (S) The Afghan legal experts expressed general agreement that the detainees in five of the six "test cases" (reftel) would be prosecutable under Afghan law. They assessed that one -- the Hawala dealer -- would not be prosecutable, due to an apparent lack of evidence. There appeared to be

general (though perhaps fragile) consensus that the "clock" on pre-trial detention would start when a detainee is transferred from U.S. custody to the GoA. This apparent consensus was only reached after the MOJ representative, Said Yousuf Halim, suggested that the clock would already have started from the time the detainees were taken into initial U.S. or Coalition custody -- Halim's comments subsequently were rejected by the other Afghan experts, and he did not further assert this theory. However, Halim and some of the other Afghan legal experts said that it is possible that an Afghan judge might credit a detainee's time in U.S. custody as "time served" when handing down a prison sentence, thus reducing the length of the convicted individual's prison term.

16. (S) According to the experts, the GoA would have one month after receiving custody in which to charge a detainee in an Afghan court. After that, Afghan law provides for two months to complete the first trial, two additional months for an appeal, and up to five additional months for a final appeal. Per the Afghan legal experts, the GoA can detain someone for a total of ten months, including pre-trial and during-trial detention. They explained that, according to Afghan law, individuals wrongfully detained (beyond the limits provided for in the law, or in contravention of a court order) could demand 300 Afghanis (approximately \$6) per day of wrongful detention. Several of the GoA legal experts participating in the meeting asserted that detainees who are prosecuted under Afghan law, but subsequently acquitted, would have grounds to lodge a monetary claim against the USG for the number of days spent in U.S. custody, at the rate of \$6 per day. (Comment: Such "grounds" would be inconsistent with the apparent consensus view among the GoA legal experts that the clock on pre-trial confinement starts upon transfer to the ANDF. End Comment)

17. (S) All the Afghan legal experts emphasized the importance to successful prosecutions of having adequate evidence, which they described in general terms as signed statements by the capturing officials, witness statements, confessions (if given), pictures (if available), and other physical evidence. The NDS legal advisor mentioned several

times that, in cases where the evidence is not clear, Afghan officials can seek to develop additional evidence via interviews and further investigation.

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NEXT STEPS  
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¶8. (S) Malik Quraishi (Assistant to Deputy NSA Engineer Ibrahim), who organized the February 12 meeting, planned to reconvene the Afghan legal experts again on February 18, for internal discussion (without USG representatives present). Quraishi indicated that he realized from the February 12 discussion that the Afghan legal experts still have a number of key areas of disagreement that need to be sorted out. (Comment: Assistant Attorney General Aloko had been expected to attend the meeting, but reportedly was pulled away by other urgent business at the last minute. The AG's views on all these issues will be critical to the GoA forming a coherent position. End Comment) Quraishi explained that he intended to use the February 18 internal meeting to organize the GoA's written statement outlining how it would intend to handle transferred detainees under Afghan law (reftel). He said that he aimed to have the written response ready by February 19 or 20. (Note: Polmiloff and CSTC-A representatives met with Quraishi on February 14 to emphasize to him our concern regarding the "security detainee" issue, and to impress upon him the need for the GoA to address in detail its proposed legal/procedural framework for handling transferred detainees. End Note)

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COMMENT  
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¶9. (S) The GoA is attempting to meet as closely as possible our request for a written response within two weeks of receiving the translated "test cases" (reftel). However, from the discussion during the February 12 meeting, it is clear that the GoA's legal experts are not yet ready to provide cogent advice to the GoA leadership to underpin such a response. Post will continue to press for a timely and comprehensive response.

¶10. (S) The Afghan legal experts have not identified any basis in Afghan law for the GoA to maintain security detainees. We have continued to emphasize the importance of this aspect of the commitments undertaken by the GoA in the bilateral understanding on detainee transfers reached in August 2005, but the GoA thus far has not succeeded in establishing or identifying a legally and politically viable means to deliver fully on that commitment. The Afghan legal experts clearly are now focused on issues surrounding detainee prosecutions. There are a number of key questions that they will need to sort out and address in formulating the GoA's written response. Notwithstanding the apparent consensus that the "clock" on pre-trial detention does not start until after the detainee is transferred to GoA custody, we will need to have a very clear answer on this from the Afghan legal perspective. Moreover, we think it will be important to have an understanding of the kinds of sentences likely to be handed down for the crimes for which detainees are most eligible to be prosecuted.

¶11. (S) Procedurally, we will need to have clarity on the structure of the Afghan interagency review board that will review the cases of transferred detainees, including who will participate, who will chair, and who will retain and manage the case files of the transferred detainees. We also will need clarity as to whether the GoA would intend to hold a transferred detainee at the ANDF during the prosecution of that detainee (we presume yes, but this may not be practical if the detainee is tried in a provincial court outside of Kabul), and after sentencing (this is not clear, but it seems likely the GoA would opt to transfer a detainee sentenced under Afghan criminal or national

security law to a separate MOJ or NDS facility to serve out his prison term). Another question that concerns not only the GoA, but also ISAF partners is whether the ANDF at some point will be available for holding detainees taken by ISAF forces and rendered to the GoA under the terms of the current ISAF ROE. This latter issue is certain to gain more attention in the midst of intensified spring/summer combat operations and the media coverage that will accompany any U.S. transfers from BTIF.

¶12. (S) Post will continue to seek as much clarity as possible regarding how the GoA intends to apply Afghan law and procedures to any detainees transferred from the BTIF or GTMO. Our attempts to obtain such clarity must nevertheless be viewed against the backdrop of the still evolving Afghan justice system. It is inevitable that the same corruption and inefficiency that affects the Afghan justice system generally will impact the handling of the cases of detainees transferred to the GoA for prosecution. Each transfer decision must therefore factor in this inherent risk.

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AMBASSADOR'S RECOMMENDATION  
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¶13. (S) If post receives the expected response from the GoA, Ambassador recommends that we be authorized to provide the GoA with our reaction also in writing. Such a letter would state that unless and until the GoA identifies a legal basis for continued detention of detainees who pose a security threat, and guarantees their ability to detain them, we will not be able to transfer detainees. If they have concluded that no such basis

exists, then they will need to pass a new law if they are serious about getting the detainees back. Following delivery of the letter, we should probably brief the Parliament on the state of play as well.

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MEETING ATTENDEES  
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¶14. (SBU)

GOA:

Abdul Malik Quraishi, Director of Policy and Oversight,  
Office of the National Security Counsel (ONSC)  
Sayed Zahir, Legal Advisor, National Directorate of  
Security (NDS)  
Said Yousuf Halim, General Head of the Legislative  
Institute, MOJ  
BG Abdul Majeed, Chief Judge of the Military Court of  
Appeal, MOD  
BG Sher Mohammad Zazai, Judge Advocate General, MOD  
MG Mohammad Amin Nooristani, Director General of Legal and  
Judicial Affairs, MOD

USG:

Embassy Deputy POLMIL Counselor  
CSTC-A Staff Judge Advocate  
CSTC-A Chief of Detainee Operations  
Interpreter (CSTC-A Detainee Operations)  
NEUMANN